BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2021-349-E

In the Matter of: Joint Petition of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC to Request the Commission to Hold a Joint Hearing with the North Carolina Utilities Commission to Develop Carbon Plan	DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC'S REPLY TO THE OPPOSITION OF GOOGLE, LLC, AS WELL AS THE OBJECTIONS OF CIGFUR AND NCSEA, TO MOTION TO RECUSE

Pursuant to S.C. Code Ann. Regs. 103-829, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively, the "Companies"), by and through the undersigned counsel, submit to the Public Service Commission of South Carolina (the "Commission") their Reply to Google, LLC's ("Google") Opposition to the Motion to Recuse Commissioner Thomas J. Ervin, as well as the Objections of Carolina Industrial Group for Fair Utility Rates II's ("CIGFUR II") and the Carolina Industrial Group for Fair Utility Rates III's ("CIGFUR III") (together, "CIGFUR") and North Carolina Sustainable Energy Association ("NCSEA") to the Motion to Recuse.

No arguments from Google, CIGFUR, or NCSEA can change the fact that Commissioner Ervin's statements on the record at the Special Business Meeting show he has prejudged a ruling on the Companies' request, did so without hearing from a single party or considering any evidence, and encouraged other Commissioners to do likewise. Respectfully, his statements ran afoul of the Code of Judicial Conduct by which all Commissioners are bound. *See* S.C. Code Ann. § 58-3-30(B); Rule 501, SCACR. Accordingly, for the reasons that follow, as well as those set forth in the Companies' Motion to Recuse, the Companies maintain that Commissioner Ervin should be disqualified from any further participation in this docket.

ARGUMENT

Because Google was the only intervenor to substantively respond to the Motion to Recuse, the Companies' Reply is primarily directed toward Google's opposition.[1] Notwithstanding the charged rhetoric in Google's filing, its arguments necessarily fail for three reasons. *First*, the cases on which Google relies do not support its position. *Second*, Commissioner Ervin's prior recusals show the same result is required here. *Third*, Google's mischaracterizations of the Companies' joint petition add nothing to the analysis of the issue at hand—whether recusal is mandated. The Companies will briefly address each in turn.

I. The cases on which Google relies do not support its position and, in fact, demonstrate recusal is mandated.

Consider first, as Google does, the case of *Murphy v. Murphy*, 319 S.C. 324, 461 S.E.2d 39 (1995). In that case, our Supreme Court found no evidence of "judicial bias or prejudice" stemming from the family court judge's prior representation by one of the attorneys before him. *Id.* at 331, 461 S.E.2d at 42. The facts of *Murphy* are thus inapposite, and the case warrants no further discussion.

Turning next to *United States v. Grinnell Corp.*, Google fares no better. 384 U.S. 563 (1966).[2] There, the U.S. Supreme Court found that "[a]ny adverse attitudes" the district judge "evinced toward the defendants were based on his study of the depositions and briefs which the

[1] While the Companies appreciate CIGFUR's research of recusal motions in the sole jurisdiction in which it operates (i.e., North Carolina), CIGFUR fails to show any relevance whatsoever to its observation that the Companies have never filed a motion to recuse with the North Carolina Utilities Commission ("NCUC"). As noted in their motion to recuse, the Companies appreciate the extraordinary nature of their request, the first they have ever made in South Carolina. And they did not make it lightly. But Commissioner Ervin's comments, not any action of the Companies, compelled them to file the motion. That they have not done so before only further underscores the unusual situation in which the parties find themselves after the Commission's special business meeting.

[2] Curiously, Google represents that the *Murphy* court cited *Grinnell* for the quoted proposition. In fact, that is not the case.

parties had requested him to make. What he said reflected no more than his view that, if the facts were as the Government alleged, stringent relief was called for." *Id.* at 583. Under those circumstances, the Court properly recognized that "alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Id.* Nevertheless, "[d]uring the trial," the judge "repeatedly stated that he had not made up his mind on the merits." *Id.*

Here, unlike in *Grinnell*, there were no briefs or depositions on which Commissioner Ervin could rely. No party has had the opportunity to be heard about the Companies' request for a joint proceeding with the NCUC or the merits of the Carbon Plan. In other words, Commissioner Ervin had no evidentiary record before him at the time he publicly stated his views that the Companies' petition should be summarily and immediately dismissed. Consequently, in line with *Grinnell*'s standard for requiring recusal, Commissioner Ervin's views *must* have been developed from an extrajudicial source. What is more, no hearing of any kind has taken place, and no one asked Commissioner Ervin for his preliminary views on the underlying merits of the Companies' request. *Cf. id.* at 583. As a result, Google's attempted application of *Grinnell* is distinguishable, while the substance of *Grinnell* actually proves the Companies' point: Commissioner Ervin made up his mind prior to the development of any record and publicly gave his unsolicited views on the merits of the case before a single party appeared before the Commission.

Nor does *Roper v. Dynamique Concepts, Inc.* save the day for Google. 316 S.C. 131, 447 S.E.2d 218 (Ct. App. 1994). That case merely stands for the proposition that "[a] judge is not required to recuse himself merely because he presided over other proceedings on the same or related cases." *Id.* at 139, 447 S.E.3d at 223. Because the Companies have made no such allegation here, *Roper* offers no assistance to the recusal inquiry at hand.

Last, contrary to Google's suggestion, the Companies did not "merely" allege bias. Google Resp. in Opp., Docket No. 2021-349-E, at 4 (Jan. 10, 2022). Rather, they demonstrated Commissioner Ervin's bias by providing his comments on the record attempting to rule on the merits of a proceeding before it even started. To that end, *Mallett v. Mallett* is in accord with the Companies' position. 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996) (per curiam). As the *Mallett* court noted, "[i]t is axiomatic that the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process embodied in the United States Constitution." *Id.* at 147, 473 S.E.2d at 808; *see also* S.C. CONST. art. I, § 3 (providing a state constitutional guarantee of due process); S.C. CONST. art. I, § 22 (guaranteeing due process specifically in administrative proceedings). In doing so, the court expressed "concern" with the trial judge's questionable conduct in that case, finding "prudence and judiciousness would have dictated the trial judge [to] disqualify himself." *Mallett*, 323 S.C. at 147, 473 S.E.2d at 808. But the court saw "no indication from the record the trial judge ever expressed an opinion on the merits of the case prior to his decision." *Id.* Tellingly, instead of ruling on the recusal question, the Court of Appeals simply ducked the issue as being moot. *Id.* at 147–48, 473 S.E.2d at 808.

The opposite occurred here. Commissioner Ervin did "express[] an opinion on the merits of the case prior to [the Commission's] decision," and he had no record before him on which to base that opinion. *Id.* Recusal is therefore required. Google's selectively incomplete analysis of the above cases does not change the result.

II. Commissioner Ervin's appropriate recusal in two proceedings last year show the same result is required here.

Next, the objecting intervenors blithely contend that the Companies' request is "without merit"—and "lacks legal or factual basis"—because Commissioner Ervin was well within his rights to express a view on the law. NCSEA Obj. Ltr., Docket No. 2021-349-E, at 1 (Jan. 11,

2022); CFIGUR Obj. Ltr., Docket No. 2021-349-E, at 1 (Jan. 10, 2021); Google Resp. in Opp., Docket No. 2021-349-E, at 1 (Jan. 10, 2021). Not so. Look no further than Commissioner Ervin's decisions to recuse himself from two separate proceedings last year.

First, in the docket concerning Dominion Energy South Carolina, Inc.'s ("Dominion") proposal solar choice program tariffs, Commissioner Ervin clearly expressed his views on the merits in questioning a Dominion witness and stated the following:

> Yeah, there's a market until you take it away, that's exactly right. There's a big market until you take it away, and that's what you're proposing we do and I'm not buying it. I'm not buying it and I can tell you that I'm gonna fight it because it's wrong and it's wrong for all of these eleven thousand customers of yours that made a financial investment thinking that they would have a chance over time to save money and you're taking that away. And so I just want you to know I'm not happy about your proposed rate, I don't think it's justified and I'm going to do everything in my power to see that it doesn't pass. I just want to put you on notice because it's not right.

Dominion Mot. to Recuse, Docket No. 2020-229-E, at 3 (Feb. 26, 2021) (emphasis omitted). Dominion then filed a motion to recuse, *id.* at 1–5, which Commissioner Ervin mooted by voluntarily recusing himself. *See* Directive, Docket No. 2020-229-E (Apr. 28, 2021) (noting Commissioner Ervin was recused). His comments on the merits mirror those at issue here. *Cf.* Duke's Mot. to Recuse, Docket No. 2021-349-E, at 5 (Jan. 7, 2022) (quoting *Special Business Meeting*, PUB. SERV. COMM'N OF S.C. at 50:27–52:36 (Nov. 18, 2021)).

Importantly, however, Commissioner recused himself from the Dominion solar choice proceeding after expressing his view on the merits before any party closed its case in chief. *See* Dominion Mot. to Recuse, *supra*, at 4. In other words, this occurred during the middle of the proceeding. Where, as here, Commissioner Ervin's premature views on the merits came before the first piece of evidence was introduced and before any party appeared before the Commission

to argue their case, the same result is required. Fundamental notions of due process require no less. *See* U.S. CONST. amends. V & XIV; S.C. CONST. art. I, §§ 3 & 22.

Second, in a hearing in dockets involving the Companies' request for Commission approval of an energy efficiency program, Commissioner Ervin intensely cross-examined an Office of Regulatory Staff ("ORS") witness about the program using a report the Chair had previously ruled inadmissible. Counsel for ORS subsequently asked Commissioner Ervin if he had "reviewed material outside of the record" and "whether he ha[d] made any final conclusions with respect to . . . what the evidence so far presented in this proceeding shows." Hr'g Tr., Docket Nos. 2021-143-E & 2021-144-E, at 392:1–10 (Nov. 2, 2021). Although ORS did not specifically move to recuse Commissioner Ervin, he decided to recuse himself *sua sponte* before the hearing continued the following day. Hr'g Tr., Docket Nos. 2021-143-E & 2021-144-E, at 449:18–20 (Nov. 3, 2021). In deciding to recuse, Commissioner Ervin stated as follows:

> I had a chance to reflect on yesterday afternoon's exchange, and I was asked by counsel for ORS, after Commissioner questioning, whether I thought I could continue to be fair and impartial or had I made up my mind. I believe the record will reflect that I have not made up my mind, and I was going to listen carefully to the testimony and the evidence, and that's what I intended to do. But I also want to protect the integrity of the process. I respect this process. I consider it a search for the truth, and I don't want any party to have any doubt. After the hearing's over and after the order's been filed, and all appeals have been heard and disposed of, I don't want anyone to have any doubt that they got a fair and impartial hearing.
>
> And while counsel for ORS did not ask me to recuse, I want to further ensure the . . . process is fair to all concerned, and I think it best that I step aside and recuse myself on my own motion, and, to the extent that we had an exchange that may have offended someone, I'm deeply sorry, and I apologize for that. I was trying to develop a record that the Commission could rely on to find truth and render a fair and just decision.

> And so, Mr. Chairman, I'm going to recuse myself from further participation in . . . these two dockets. And for that reason, I will not be participating in the deliberations, nor will I be participating in the order writing or the final order or any post-trial motions. I'm recusing myself for the reasons stated.
>
> And I appreciate the work that the parties are doing. I know that it has been a highly contested case, but I know that you are trying to find a result that's in the best interests of everyone, and I want to encourage you, in the sense that, you know, I respect your role as advocates, and I certainly expect for you to stand up for your clients.
>
> And, Mr. Chairman, I'm going to sign off, having recused. Thank you, sir.

Id. at 448:18–450:8.

Yet two weeks later, Commissioner Ervin did the same thing in this case. *E.g.*, *Special Business Meeting*, *supra*, at 50:27–52:36. The considerations that drove Commissioner Ervin to recuse in these previous cases require the same result here. In this case, the record does not reflect that Commissioner Ervin has refrained from reaching a final conclusion. To the contrary, he expressed his preference that the Companies' petition be dismissed out of hand and encouraged his fellow Commissioners to join him in taking that action.. And he did so not in the middle of the case but at the very beginning without any record or appearance of the parties. With all due respect, this was improper.

Therefore, "to protect the integrity of the process" and ensure it "is fair to all concerned," Commissioner Ervin must be disqualified. His reasoning in prior recusal decisions confirms as much. So does the Code of Judicial Conduct. Notably, Google does not even attempt to wrestle with the specific ethical canons Commissioner Ervin disregarded. *See* Canons 1, 2(A), 3(B)(5), 3(B)(9) & 3(E), Rule 501, SCACR.

III. Google's misstatements about the Companies' joint petition add nothing to the analysis of the recusal question.

Finally, the Companies wish to briefly address Google's misleading and over-the-top statements about what they are requesting in this proceeding.

To be clear, the Companies are not asking the Commission to cede the sovereignty of the State of South Carolina or to sit "at the children's table." Google Resp. Opp., *supra*, at 5. And contrary to Google's representations, the Commission will very much have a say in the joint proceeding to the extent the Commission chooses to participate in one as expressly allowed under South Carolina law. *See* S.C. Code Ann. § 58-27-170. It is the Companies' proposal that the Commission, following the joint proceeding with the NCUC, make a separate and independent determination regarding the applicability of the Carbon Plan to the resource planning of DEC and DEP for South Carolina. Further, Google's arguments that the Companies are trying to hand-select its judges and that any remaining Commissioner will be stained as "Duke approved" are patently frivolous. Google Resp. Opp., *supra*, at 6. As for the remaining contentions made by Google, they have nothing to do with the current inquiry into whether Commissioner Ervin must recuse. A response to these points is more appropriate for the comments due on January 31, 2022, and the Companies will reserve any substantive response until that time.

CONCLUSION

As the Supreme Court of South Carolina recently cautioned, the Commission "must not only be fair and impartial, it must be diligent in its duty to avoid the appearance of impropriety." *In re Blue Granite Water Co.*, 434 S.C. 180, 204, 862 S.E.2d 887, 800 (2021). Respectfully, Commissioner Ervin's comments during the Commission's special business meeting failed to live up to that standard as articulated in the Code of Judicial Conduct. Recusal is therefore mandated. Accordingly, Commissioner Ervin should be disqualified from any further participation in this

docket, including but not limited to voting on whether to hold a joint proceeding with the NCUC and, if so, in ruling on the merits of the Carbon Plan.

Dated this 13th day of January, 2022.

Respectfully submitted,

/s/Frank R. Ellerbe, III
Frank R. Ellerbe, III
Vordman Carlisle Traywick, III
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Columbia, South Carolina 29201
(803) 929-1400
fellerbe@robinsongray.com
ltraywick@robinsongray.com

Camal O. Robinson (*pro hac vice motion pending*)
Deputy General Counsel
Duke Energy Corporation
40 W. Broad Street, Suite 690
Greenville, South Carolina 29601
(864) 238-4385
Camal.Robinson@duke-energy.com

Attorneys for Duke Energy Carolinas, LLC and Duke Energy Progress, LLC